IN THE

Supreme Court of the United States

October Term, 1947

No. 75

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING.

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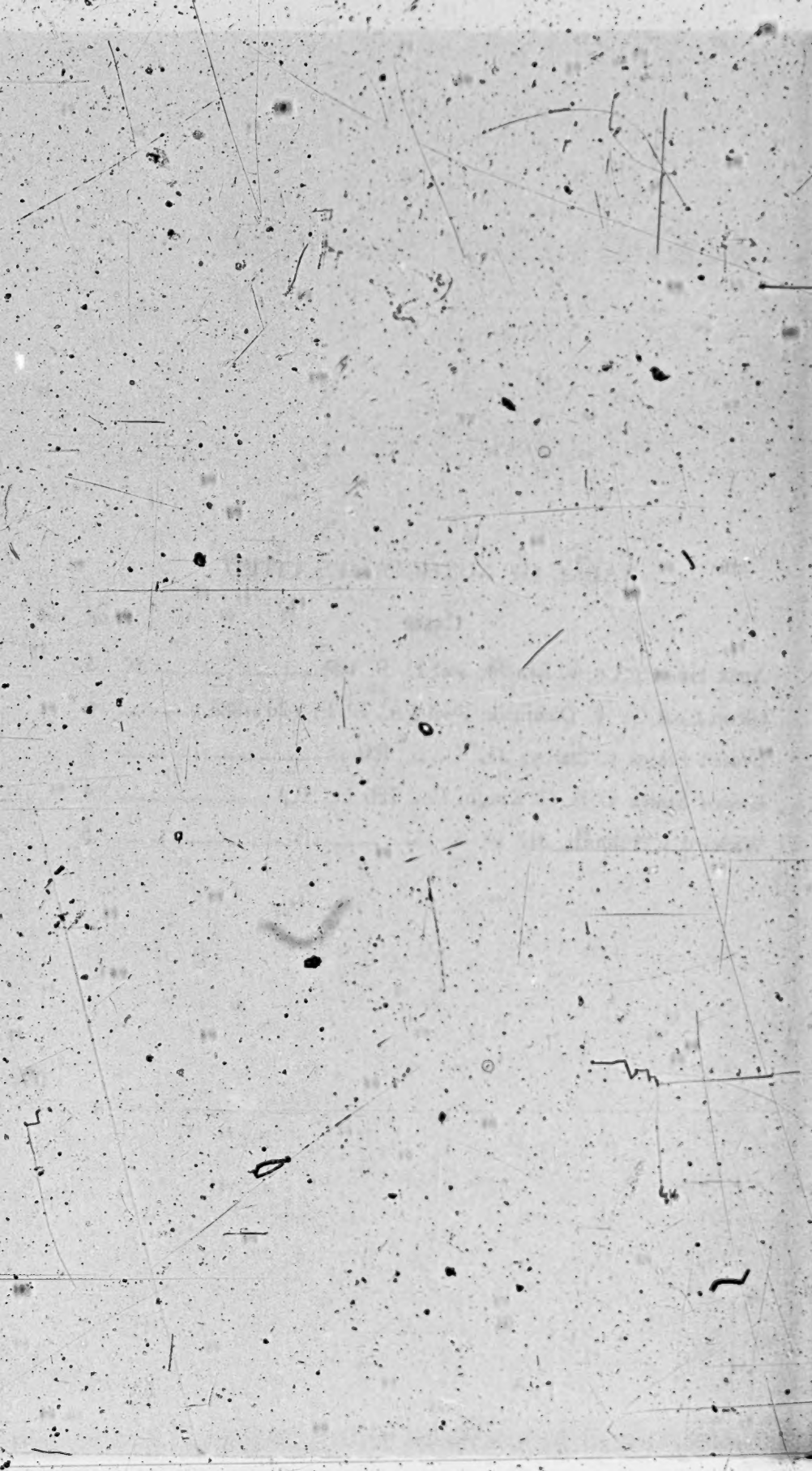
TABLE OF AUTHORITIES CITED



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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully petitions for a rehearing of this cause upon the following grounds:

1. The Court has failed to decide the case presented to it;

2. The Court has decided the case upon assumptions of fact which are non-existent and which were disclaimed by petitioners both in the courts below and *in this Court itself.*

The case presented to the lower courts and to this Court was whether or not, absent any effect upon the price of the processed interstate commodity (sugar), an

alleged combination to fix the price of a locally grown and processed farm product (sugar beets) violates the Sherman Act. This question, which was the question decided in the negative by both the District Court and the Circuit Court of Appeals, has not been decided by this Court.

What *has* been decided by this Court is, with all deference, that both respondent and the District Court have been entrapped by a stipulation entered into for the express purpose of permitting petitioners to have an inexpensive appeal in order to test the question posed above. And the record clearly bears this out.

The original complaint charged that the refiners, *regardless* of the price at which *sugar* was sold from any particular refinery, paid the growers the same price for their beets of equivalent sugar content. [R. 11.] At the same time the same paragraph (XI) charged a conspiracy to restrain interstate commerce in *sugar and sugar beets*. [R. 10.] *This* was the ambiguity which the Court mentions at pages 24-25 of the slip opinion when it says:

> "With no further support from the record, it has been assumed that the ambiguity so elided was the reference to restraint of trade in *sugar* and hence the petitioners in making it stated themselves out of Court."

There is, however, further support from the record. The stipulation itself (Slip Opinion, dissent, p. 2) recites that the District Judge suggested that the contracts be attached to the amended complaint and that, *if that were done*, the Sherman Act count would not, in his judgment, state a cause of action. Why not? Because, obviously, the contracts revealed that the beets alone were the subject of the pricing formula and the formula itself re-

vealed that the beet price was not a factor in the sugar price, but that the exact reverse was the case. A recourse to the opinion of the District Judge [R. 100-108] amply reflects his understanding in this regard. *Possible restraint as to the sugar was not even discussed therein.*

Nor is this all. In this very Court, at the oral argument, counsel for petitioners *conceded* that the purpose of the stipulation was to eliminate any charge that the alleged conspiracy affected the price of the sugar:

> "Justice Jackson: If it did not restrain commerce in sugar or sugar beets, in what did it restrain commerce?
>
> Mr. Arndt: The only reason those words were taken out was this: The District Judge thought that by the use of the word 'sugar' there we were alleging that the price of sugar to the ultimate consumer was—
>
> Justice Jackson: Affected?
>
> Mr. Arndt: —was affected, and we told the court that *we had no intention of so alleging and did not so allege,* but the District Judge said 'With those words "sugar" and "sugar beets" in there it may be construed that way.'
>
> So to avoid any question that we were not claiming that the price of beets, of sugar, to the ultimate consumer was affected, only the price paid the producer, those words were taken out." [Ward & Paul, Tr. pp. 16-17.]

As emphasizing this situation, the following colloquy is also of interest:

> "Justice Frankfurter: Is it a fact that the price of beets was determined by what price the refiner would get in the market for his sugar?

Mr. Arndt: Yes.

Justice Frankfurter: That is a fact?

Mr. Arndt: That is a fact.

Justice Frankfurter: And the cost to them wasn't predetermined by what they had to pay for your beets; is that right? The sale price there, they didn't have to take beet sugar at a price which was fixed by this agreement, did they?

Mr. Arndt: That is correct, *because there was no fixed price;* it was a formula price, *it worked backwards.*" [*Ibid.*, p. 67.]

These concessions it is submitted, undermine the very foundations of the majority opinion. It cannot be said, as the opinion does say (p. 25), that the ambiguity "arose from the reference to interstate trade in *beets.*" Nor can it be said, as the opinion does intimate in various places, that the conspiracy affected the *quantity* of sugar interstate commerce. Quantity, or supply, is obviously an inseparable factor of *price.* Hence, when it is conceded that the price to the ultimate consumer was not affected, it is implicit in the concession that the same was true of supply. *And the amended complaint is wholly barren of any allegation even remotely to the contrary.*

Beyond all this, petitioners have never claimed and they do not claim now that the ultimate consumer of the interstate product was affected one iota by the combination alleged. It was for this reason that we have maintained throughout this case that the combination alleged had no substantial effect upon interstate commerce. And in making that contention, we have not followed, as the opinion seems to imply, the pattern of such early cases as *United States v. E. C. Knight Co.*, 156 U. S. 1. On the contrary,

we have followed the pattern of *Wickard v. Filburn*, 317 U. S. 111, with its holding that the proper standard is whether or not a substantial economic effect has been exerted upon interstate commerce; the pattern suggested in *Apex Hosiery Co. v. Leader*, 310 U. S. 469: ("Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce are not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition"); and last, but not least, the fact, *conceded in United States v. Darby*, 312 U. S. 100, that manufacture, as such, is not commerce.

It is true, of course, that in *this* Court petitioners took the anomalous position that, although they made no claim that the price of sugar to the ultimate consumer was affected, interstate commerce in sugar was restrained because, it is said, their complaint "specifically alleged that they (the refiners) no longer competed as to the efficiency of sales or manufacturing organizations of themselves and that *regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations*, they paid all the growers within this district the same amount based upon the same fixed formula." [Tr. p. 8.] And the opinion, with all respect, stresses these atmospheric allegations as bringing sugar back into the case *after the petitioners had taken it out.*

The opinion of the District Judge faithfully reflects the fact that no such contention was made in the court below. And we think it only proper to call to the attention of the Court that, it having been conceded that the price of sugar

remained unaffected, the only effect of such allegations, wherever they appear, is to charge that due to assertedly increased expense, respondent's *net returns* were allegedly decreased, *without affecting the price to the consumer at all.* This, were petitioners able to prove it, might be material on the issue of damages alone, viewed in the abstract. But we submit that the question of whether respondent's operating expenses went up or down was not of the slightest concern so long as these factors were not reflected in the price to the interstate consumers; *and petitioners concede that it was not.*

We also believe it proper to point out that the allegations which the Court has deemed sufficient to keep sugar in the case were all conclusions of the pleader* Compare *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. (2d) 885, 887. They were directly attacked as such by motion addressed to the original complaint. [R. 32, 34-35, specifications 8(a)18(d).] After the reference to the sugar was deleted from the charging paragraph, the motion for a more definite statement was not renewed because, while the allegations to the same effect in the amended complaint still constituted mere conclusions of the pleader, they were meaningless as well as erroneous when applied to the beets alone; a proposition with which the Court apparently agrees since it seems to concur (Op. p. 26) in *petitioners'* contention that the only interstate trade was in *sugar.*

We concede, of course, that our motion to dismiss admitted, for the purposes of the motion, all of the well-

*See, for instance, the allegation set forth in note 6, at page 6 of the opinion, which is correctly characterized as summarizing petitioners' *conclusions.*

pleaded *facts* set forth in the amended complaint. *But it did nothing more.* It did not admit conclusions of the pleader nor did it admit conclusions of law.

It is urged with all deference that, for the reasons given above, the decision of the Court is based upon factual assumptions and conclusions which were and are utterly foreign to those admitted by the motion below or considered by the District Judge in passing upon the motion; and that a decision which rests upon assumed facts which do not exist, and the nonexistence of which is established by the record, is undeniably a miscarriage of justice; wherefore, respondent prays that a rehearing be granted in order that the Court may reconsider the matter, and that pending such rehearing the mandate of the Court may, by appropriate order, be stayed.

Respectfully submitted,

(Sgd.) LOUIS W. MYERS,

(Sgd.) PIERCE WORKS,

Attorneys for Respondent.

O'MELVENY & MYERS,
JOHN WHYTE,
Of Counsel.

Certificate of Counsel.

I, Pierce Works, do hereby certify that I am one of the attorneys for respondent herein and that the foregoing petition is presented in good faith and not for delay.

(Sgd.) PIERCE WORKS.